LIM KEE GEE & ORS.

v.

CHUNG WAH EMPORIUM SDN. BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL APPEAL NO. 1 OF 1981]
10 JUNE 1985

LANDLORD AND TENANT: *Tenancy - Oral tenancy - Whether on month to month basis - Tea money paid - Tenants renovated premises substantially - Used demised premises as coffee shop and hotel - Demised premises sold to third parties - Whether new owners bound by the tenancy.*

CIVIL PROCEDURE: *Whether open to Court to decide on issues not disclosed in pleadings.*

This was a tenants' appeal arising out of a suit in the Sessions Court for vacant possession of certain premises. The issue raised was whether the period of the notice to quit expressed to expire at the end of a calendar month was sufficient to determine the tenancy. The respondents who became landlords by purchase say that it was, since the tenancy (which was oral), was on a month to month basis. The tenants/appellants deny that. They alleged that they had paid tea money of RM65,000 to the previous owners of the premises. When they took up the tenancy in 1959, they spent about RM34,400 making additions and alterations to the premises for business purposes. The oral agreement was that they could have the tenancy "for as long as we are able to take." The rental payable was gradually increased from RM330 to RM800 per month, even though the fair market rate was much higher then.

In June or July 1975 the appellants were informed by the previous owners that they intended to sell the premises. As the appellants could not agree with the price of RM330,000 asked for by the previous owners, the premises was sold subject to the tenancy to the respondents for RM380,000. The second issue is whether the purchase of the premises was subject to the tenancy, as provided in the Sale and Purchase Agreement.

The other question that was brought up by the Counsel for the respondents was that it was not open to the Court to consider the defences which were not pleaded, namely the oral agreement or on the plea of equitable estoppel.

Held:

[1] There was evidence that it was orally agreed by the parties that tea money would be paid. The appellants had also remained in peaceful possession for a period of more than 17 years although there never was any written tenancy agreement. The business of the appellants was of a long term nature. They would not have incurred an expenditure of RM34,000 on the premises if they were liable to be turned out on a months' notice. It was on the faith of the representation of the then landlords that the duration of the tenancy would be "for as long as we are able to take" that the appellants paid the tea money and incurred the expenditure of RM34,000. Whatever the nature of this tenancy, it was certainly for more than just a monthly tenancy. Accordingly, the notice to quit was bad in law and ineffective to determine the tenancy.

[2] The respondents when they purchased the premises took it subject to the tenancy. Whatever title they acquired as purchasers was subject to the rights of the appellants who were in possession.

[3] The objection raised by the Counsel for the respondents relating to the defence of oral tenancy being not pleaded was overruled because the respondents were never taken by surprise. Regarding the defence of equitable estoppel, it was not on equitable estoppel but on an equity. It was not essential for the appellants to have specifically pleaded this in their defence because conclusions of law or of mixed law and fact are no longer to be pleaded. It is for the Court to declare the law arising upon the facts proved before it.

[Appeal allowed with cost. Orders for possession and mesne profits set aside.]

Cases referred to:
Choo Kok Beng v. Choo Kok Hoe & Ors. [1984] 2 MLJ 165
Powell & Wife v. Streatham Manor Nursing Home [1935] AC 267
Khoo Sit Hoh & Ors. v. Lim Thean Tong [1912] AC 323
Watt v. Thomas [1947] AC 484
Yong Tong Hong v. Siew Soon Wah & Ors. [1971] 2 MLJ 105
Ong Heng Hwa Realty Sdn. Bhd. v. Teoh Chai Siok [1977] 1 MLJ 124
Esso Petroleum Co. Ltd. v. South Corporation [1955] 3 All ER 864
Re Robinson's Settlement [1912] 1 Ch 717
Pirie v. Richardson [1927] 1 KB 457
Tanner v. Tanner [1975] 1 WLR 1346
Shirlaw v. Southern Foundaries Ltd. [1939] 2 KB 206
Chandler v. Kerley [1978] 1 WLR 693
Inwards v. Baker [1965] 2 QB 29
Williams v. Staite [1979] Ch 29
Ives (ER.) Investment Limited v. High [1967] 2 QB 379

Legislation referred to:
National Land Code 1965, s. 221(3)(b)
National Land Code (Penang and Malacca Titles) Act 1963, s. 40(1)

Other source referred to:
The Judge Lord Devlin, [1969] at p. 63
Equity: Doctrines & Remedies, Viscount Dilhorne's 2nd Edn. p. 414, para. 1721
Principles of Pleadings and Practice in Civil Actions in the High Court of Justice, Odgers 22nd Edn. at p. 94

For the appellants - Peter John Mooney; M/s. Skrine & Co.
For the respondents - S. Thillaimuthu; M/s. Thillaimuthu & Phock Kin

JUDGMENT

Edgar Joseph Jr J:

This was a tenants' appeal arising out of a suit for vacant possession of certain premises known as No. 26, Jalan Kuala Kangsar, Penang ("the premises") which are not subject to the Control of Rent Act, 1956.

Upon the pleadings, the dominant question of law for decision was whether the period of the notice to quit expressed to expire at the end of a calendar month was sufficient to determine the tenancy. The respondents who became landlords by purchase say that it was, since the tenancy (which was oral), was on a month to month basis. The tenants deny that. The issue is as simple as that but, as may be expected, there were several subsidiary questions which arose upon the evidence and the submissions of Counsel both here and in the Court below.

But, first of all, I shall state the facts which were not disputed. *a*

At the inception of the tenancy on 1 January 1959, the premises were brand new and bare. This made it necessary for the tenants to make additions and alterations at their own cost, amounting to RM34,000 as they required the premises for business purposes; the ground floor as a coffeeshop and the first floor as a hotel.

The additions and alterations, which were substantial included the construction of cement partitions, attaching bathrooms to each room and the installation of longbaths, air-conditioners, electrical wiring and lighted signboards. This was done pursuant to Local Authority approval, the necessary plans having been signed by the then owners who were the immediate predecessors in title of the respondents. *b*

The coffeeshop business (known as KONG BIN) commenced on 1 January 1959 whilst that of the hotel (known as TAI AH) exactly four months later. *c*

Next, rent receipts issued and counterfoils thereof suggested that the rents paid for the premises were at the rate of RM330 per mensem and, curiously, remained constant right up to the time the respondents purchased the premises - a period of more than 17 years - although there was "persuasive evidence" (to use the words of the learned trial President) that the fair rental was at least four times as much. Not only that, but rent was always collected in cash by one of the two then co-owners, a retired Controller of Immigration (PW3), who would personally call at the premises on the 15th day of each month for this purpose. In his absence, his father-in-law would do so. *d*

Then, on 20 January 1976 the respondents purchased the premises pursuant to a Sale and Purchase agreement in writing dated 14 January 1976 which by Clause 5(c) expressly provided that the sale was subject to existing tenancies. There are, however, certain events during the negotiations leading to this sale which I must advert to as their relevance will become apparent later. *e*

Although the assistant managing director of the Respondent Company, one Ng Chee Keong and his father Ng Yean Kow, who ran its business, had been living just next door to the premises ever since completion and had, prior to purchase, checked the counterfoil rent receipts, yet they studiously refrained from themselves making enquiry from the tenants, who they knew, as to why the rent had remained so constant at such a low rate for so long. Despite all this, they preferred to leave "this matter of the tenancy to our solicitors". In any case, common sense would have told them that the business carried on at the premises was long term in nature. *f*

Lastly, it was curious that the father who, one would have expected, would know far more than the premises than his son who was a mere lad of 21 years, at the material time, was not called as a witness by the respondents, although he was present in Court. *g*

I shall next state the facts about which there was an acute conflict of evidence.

I have already mentioned the rent receipts and counterfoils and what they revealed. But the appellants say that these receipts and counterfoils do not tell the truth; in other words, they are lying documents. *h*

In order to elucidate the matter I shall now refer to the evidence called on behalf of the appellants.

i

Some time towards the end of 1958, when the premises were still under construction, five men sat round a table, in the house of one Lim Boon Pow, to discuss and, if possible, agree on a letting of the premises. They were Lim Boon Pow himself, Lim Hock Chuan (PW3), the retired Controller of Immigration, Malaya, - both of whom then owned the premises equally, - Lim Peng Kuan, and Lim Kee Gee (DW4) - both being the prospective tenants and one Lim Tong Hoon, a broker. A third prospective tenant was absent but the others who were his partners had full authority to negotiate the tenancy.

Except for Lim Hock Chuan and Lim Kee Gee - both of whom testified at the trial, the former for the plaintiffs as PW3 and the latter as a party, he being the first defendant, - the rest had all died long before the institution of the suit.

Lim Kee Gee (DW4) gave details of what transpired at this meeting.

Speaking in Hockchiew, he said:

> the terms of the tenancy were RM65,000 tea money. The lease was for a period of as long as we are able to take and the rental was RM600 a month. The receipt was to be issued for the sum of RM330 per month. Any increase of rental was to be discussed. Nature of the business - top floor was for hotel business and the ground floor was for coffeeshop. The landlord agreed to the renovations and repairs at our cost ... The premises were bare when we took it over.

Pursuant to this verbal agreement, he said that the RM65,000 was paid to Lim Boon Pow in cash because Lim Hock Chuan did not want a cheque. Payment was made not in one lump sum but by four instalments. The initial one being for RM10,000 was paid in August or September 1958. The three subsequent ones within a period of one or two months later.

He explained that although at first temporary receipts were issued in respect of these payments they were later recalled at the request of Lim Boon Pow who destroyed them once rent began to be paid, this being in accordance with what had been agreed at the meeting.

He stressed that "It was all by trust. There was no risk. I relied on my rent receipts."

Lim Kee Kee (DW5), the third defendant who succeeded to his father Lim Peng Kuan's share in the coffeeshop and hotel business, also gave evidence.

He said that he was in charge of paying rents to Lim Hock Chuan and that the latter would call personally at the premises to collect the monthly rent of RM605 on the 15th of each month. However, if Lim Hock Chuan was in Kuala Lumpur then his father-in-law would call to collect the rent.

He also said that in June or July 1975 Lim Hock Chuan came to see him saying that he intended selling the premises. As a result, the appellants discussed with Lim Hock Chuan about the possible purchase of the premises. This is how he described those discussions:

> "We offered RM320,000. Lim Hock Chuan counter-offered at RM350,000. I told Lim Hock Chuan we had paid RM65,000 as tea money and that he should consider this and sell at a lower price. Later he reduced the amount to RM340,000. After that he left ..."

> "Later, we had another discussion with Hock Chuan and he reduced it to RM330,000. I still pleaded to him and said that we had paid him tea money and requested him to reduce the price. He did not agree. For about one or two weeks Hock Chuan did not turn up and I heard that he had disposed of the premises. I telephoned him and he said he had sold the premises."

I shall next refer to the correspondence which followed the sale.

The first letter was from Lim Hock Chuan and his wife dated 20 January, 1976, addressed to the appellants and stating that they had sold the premises to the respondents to whom they should attorn tenants and pay all future rents.

The next letter, in similar terms dated 6 February 1976, from M/s. Thillaimuthu & Phock Kin, as Solicitors for the respondents, was addressed and sent to the appellants.

It evoked the following reply dated 2 March 1976 (Exhibit P5), by M/s. Skrine & Company, as Solicitors for the appellants:

> We have received instructions to act on behalf of the three partners of Chop Kong Bin in relation to the tenancy of No. 26 Kuala Kangsar Road, Penang.
>
> The tenancy gives rise to a number of complicated problems which made it necessary for the tenants to consult us and this explains the delay in making payment of the rent to your clients.
>
> The position is, the premises in question were erected in about 1958. When they were completed an oral tenancy of the whole premises was negotiated through a broker with the former owners. The terms of the tenancy were that the tenants were to pay a premium of RM65,000 and in exchange for this payment they were granted a tenancy on the terms that they would not be evicted so long as the previous owners were able to let the premises and so long as the tenants wished to occupy them. The apparent rent was fixed at RM330 per month and receipts were issued for this amount but in addition a further RM275 per month was paid for which no receipt was given. The initial total of RM605 per month was from time to time increased and as at the 1 January 1975 the total figure was RM800 per month. The receipts continue to be issued for RM330 only.
>
> During the period of their occupation the tenants spent considerable sums of money on the premises including the construction of concrete partitions for the rooms and installation of longbaths, air-conditioning and sanitary installations. Our clients have continued to occupy the premises on these terms since the date the tenancy was first created.
>
> On the basis set out above our clients' cheque in favour of your clients for the sum of RM800 is enclosed with this letter in payment of the rent due for the month of February 1976. Future rents at the same rate of RM800 per month will be paid to your clients through their secretary as instructed.

To this letter, M/s. Skrine & Company received a somewhat laconic response from M/s. Thillaimuthu & Phock Kin dated 4 March 1976 (Exhibit D6C) returning the rental cheque and stating:

> We refer to your letter of the 2 March 1976.
>
> When our clients purchased the property our clients were informed by the former owners that your clients were tenants from month to month of the premises at a rental of RM330 per month. Our clients have no knowledge of the matter contained in para. 3 and 4 of your letter.
>
> A search on the property in the Registry of Land Titles, Penang in connection with the purchase of the said property did not reveal any lease or tenancy in the manner alleged by our clients.
>
> In the circumstances our clients cannot agree to your clients attorning tenant on the same terms alleged to have been made with the former owners. We are therefore instructed by our clients to return you herewith your clients' cheque for RM800.
>
> Your clients may attorn tenant to our clients from month to month at the aforesaid rental of RM330 per month and unless we hear from you within 10 days that your clients are willing to do so our instructions are to institute proceedings for their eviction.

Accordingly, M/s. Skrine & Company, by letter dated 11 March 1976 (Exhibit D6D), replied as follows:

> We refer to your letter of the 4th instant. It is clear from its contents that your clients were aware of our clients' tenancy before they agreed to the purchase of the property. A proper precaution for them to have taken would have been to approach our clients for information as to the terms of the tenancy before completing the transaction but no approach whatsoever was made to our clients. We think you will agree that if a source of information is available and a party wilfully abstains from referring to that source he must accept any consequences following from his failure. Our clients state that the terms of their tenancy were all set out in our letter to you of the 2nd instant and they cannot in the circumstances accept the variation suggested in the last paragraph of your letter.
>
> The tenancy held by our clients is similar in nature to the tenancy considered by the Privy Council in the Chop Yong Tong Hong case and that case will of course be relied upon in any proceedings that your clients may think fit to take.

I shall now refer to the evidence called on behalf of the respondents.

Their first witness was Mr. Tan Phock Kin (PW1). His evidence was largely formal and somewhat legal.

He confirmed that his firm acted as solicitors for the purchasers who were of course, the respondents in respect of the purchase of the property. He referred to the agreement of Sale and Purchase dated 14 January 1976, being Exhibit P1 which he had drawn up. He said he caused a search to be made of the Interim Register at the Land Registry and found that there was no lease or agreement registered. The result of such search being, Exhibit P3, showed that the title to the premises was a Replacement Title, Grant First Grade (p. 10 AR2). He added, that the premises having been built in 1959 were not controlled premises.

In due course, he wrote to the tenants, on behalf of the respondents, to attorn the tenancy to the respondents and to pay future rents to them. He identified Exhibit P4 as the letter concerned and confirmed that he received the reply from M/s. Skrine & Company, being Exhibit P5, to which I have already referred.

The next witness called on behalf of the respondent was Ng Chee Keong, aged 25 years, who it will be recalled was the assistant managing director of the Respondent Company.

He claimed that he was authorised to give evidence and was conversant with the facts. He said the premises were purchased in 1976 and, that before that, PW1 had made a search at the Land Registry and duly advised that there were no encumbrances. He also claimed that PW1 informed him that the three appellants were occupying premises on a monthly tenancy at a monthly rental of RM330 a month. He said he confirmed this by checking the counterfoil receipts of the vendor which disclosed that the rental was indeed RM330 a month. He then said that the appellants having failed to attorn the tenancy, notice to quit dated 24 June 1976, being Exhibit P7, was given to them through his former solicitors.

Under cross-examination, this witness confirmed that he and his parents had lived at No. 24, Kuala Kangsar Road which, incidentally, was just next door to the premises, ever since it was completed and in fact he grew up there. He said his father who ran the Respondent Company's business was present in Court. However, as I have said, the father was not called. He then concluded with this somewhat guarded statement:

> Whether the rent of RM300 was low for No. 26, was between vendor and defendants. I left the rest to my solicitor. It was not within my powers.

The next witness called on behalf of the respondents was Lim Hock Chuan, the retired Controller of Immigration, West Malaysia.

He said that he and his friend Lim Boon Pow, since deceased, had in 1958 bought the vacant land on which the premises were erected the following year.

His version as to the circumstances in which the appellants rented the premises was very different from that put forward by the appellants.

He claimed that his deceased partner had let the premises to one Lim who had since died. He was obviously referring to Lim Peng Kuan, the father of the third appellant. His late partner had told him that there was no lease and the tenancy to the appellant was on a month to month basis, the rent being paid monthly. In June 1959, his deceased partner sold his one-half share in the premises to him and his wife. In the result, this witness had three-fourths share and his wife a one-fourth share; so together they owned the whole of the premises, which he thereafter managed.

He confirmed that his late partner had informed him of "the affairs connected with the property". He was, however, careful to say there was not **to his knowledge** any other oral agreement or oral terms other than the monthly tenancy.

He was also, obviously, a careful person who kept his papers and other records, for example, he kept the counterfoil receipt books for house rent for as far back as 1962. He also kept all his assessment receipts.

Continuing his evidence, he said the tenants had done some renovations to the premises. What he meant, of course, was not renovations but alterations and additions, a fact which is borne out by the plans adduced in evidence. In this connection, he said the original tenant, referring no doubt to Lim Peng Kuan, had seen him about this; specially, about attaching bathrooms to each room bringing along a City Council plan for this purpose which he signed.

He insisted, however, that he had never agreed that the tenants could stay on indefinitely or that he would pay compensation when they moved out.

He confirmed the curious fact that despite his status, he personally went to the premises on the 15th of each month to collect the rent which was always paid in cash for which he issued a receipt each time.

It was clear from the cross-examination that this witness was hardly a model of candour and that as far as possible, was passing the buck to his deceased partner, Lim Boon Pow. A few references to his evidence will illustrate this.

In the first place, he claimed he was not present when the negotiations for the tenancy took place but his deceased partner Lim Boon Pow "who did most of the transactions" was. He gave no reason for his absence or where he was at the time. Be that as it may, he said his partner told him that he had found a tenant and wanted to rent the premises on a month to month basis, adding, "After he (Lim Boon Pow) met the defendant he also met and told me he rented the premises on a month to month basis." He was emphatic when he said:

> I only know what was told to me by my partner. I deny I was present at a meeting with the defendants. If there were other terms I would not know.

I must pause, at this stage, to make an observation on a point of law. If this witness was absent from the crucial meeting, as he claimed, then his entire evidence as to the terms of the tenancy would be hearsay and inadmissible, thus leaving only the testimony of the First

appellant (DW4), he being the sole survivor of those present. The learned President does not appear to have appreciated this point.

Returning to PW3's evidence, when pressed about the payment of RM65,000 tea money in 1959, he claimed: "If my deceased partner took money I did not get my share.".

Again, he denied that there was an agreement that the tenants could occupy the premises for as long as they wanted. Similarly, he said there was no agreement for a lease for three years or five years, adding, that he was not personally present when the agreement was negotiated. However, he made the concession, which incidentally was underlined in the learned President's notes of proceedings: **"There is only a possibility that it was a term of the agreement."**

Perhaps, understandably, he denied that the rental paid was RM605 and not RM330 as appeared from the official receipts.

He acknowledged, that generally, one gets a better price for property if it is sold free from encumbrances but nevertheless he sold the premises subject to the tenancy as appeared from Clause 5(c) of the Agreement of Sale and Purchase. Adding, "I was not interested in terminating the tenancy and getting a better price."

He explained that he sold the property when the purchasers came to see him and he responded by saying, "They **would have to purchase the property subject to tenancy."** (Emphasis is supplied). This was somewhat surprising if, as he said, the appellants had merely a monthly tenancy since he could easily have caused the appellants to vacate and sold the premises with vacant possession thus fetching a far better price unless, as suggested by Dato' Mooney, for the appellants, he had no scruple about going back on his word but some scruple about commencing proceedings for ejectment.

Explaining why rental was paid invariably in cash for 17 years, he claimed it was the tenants who had elected to do so. I find this explanation a little hard to understand; the appellants were operating a coffeeshop and hotel business and one would have thought that the natural thing for them to have done was to pay by cheque. Be that as it may, common sense will supply the answer to the question who benefitted from payment of rent in cash if, as found by the learned President, the actual rent paid was not RM330 as appeared from the receipts but "gradually increased ... to RM800" per month (p. 95A AR1).

What the learned President failed to appreciate, however, was the effect of this finding on the credibility of PW3 whose evidence, he thought, was, wholly reliable.

If, as found by the learned President, that rentals were increased from RM330 to RM800 per month then this must surely mean that PW3 was lying about the amount of rent collected. He must also have been lying when he said it was the appellants who insisted on paying rent in cash and that it was not true that he went to collect the rent in person because he "wanted to hide the actual rent". Also, at least some of the receipts which he issued for RM330 per month would then be patently false and untrue. Yet, the learned President went so far as to make the sweeping statement that PW3 was a "wholly reliable" witness. On his own findings, this conclusion was quite untenable.

This flaw in the learned President's judgment brought to mind the words of Lord Roskill in the recent Singapore Privy Council case of *Choo Kok Beng v. Choo Kok Hoe & Ors.* [1984] 2 MLJ 165, 168 Col. 2C:

> The learned Judge before reaching the single conclusion favourable to the appellant does not seem to have put into the scales his adverse findings on the other two matters which showed the appellant to be an untruthful and unreliable witness. A single statement in the judgment that the matter was one of credibility as between the parties, when the foundation of the appellant's credibility had already been destroyed by the learned Judge's other findings cannot, in those circumstances, be of itself sufficient justification for the favourable findings.

The matter does not rest there because there were other flaws in the judgment which call for analysis to determine their true effect; but as they concern questions of fact certain well-settled principles need to be kept in mind.

Now, it is right to say, at the risk of being trite, that the learned President had a great advantage, denied to this Court, of seeing and hearing the witnesses but, it has been said, that demeanour is not a touchstone of truth. It may be well to also remember what was said by Lord Wright and often quoted from his judgment in *Powell & Wife v. Streatham Manor Nursing Home* [1935] AC 267 of the possibility of Judges being deceived by adroit or plausible knaves or by apparent innocence. Much to the same effect, though in more graphic terms, is what Lord Devlin, quoting from MacKenna J. said in his book *"The Judge"* [1969] at p. 63 and which I now reproduce:

> The great virtue of the English trial is usually said to be the opportunity it gives to the Judge to tell from the demeanour of the witness whether or not he is telling the truth. I think that this is over-rated ... . I would adopt in their entirety (this being the highest form of judicial concurrence) the words of Mr. Justice MacKenna:
>
> > I question whether the respect given to our findings of fact based on the demeanour of the witness is always deserved. I doubt my own ability and sometimes that of other Judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.

Demeanour, therefore, needs to be tested against the rest of the evidence and the probabilities of the case. If, therefore, it can be demonstrated that the learned President's assessment of the credibility of the witnesses was arrived at as a result of having overlooked or misunderstood considerations relevant to the issue of credibility his conclusions as to credibility cannot in justice be regarded as unimpeachable. See the headnote (1) to the Privy Council case of *Khoo Sit Hoh & Ors. v. Lim Thean Tong* [1912] AC 323 which reads:

> Where upon an issue depending upon oral evidence there is plainly perjury on the one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the Trial Judge, who has seen and examined the witnesses, except where he has failed to observe inconsistencies or to take account of material circumstances or probabilities.

I must also echo the oft quoted principles enunciated by Lord Thankerton in *Watt v. Thomas* [1947] AC 484, namely:

> ...**I**.Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion;

> **II**. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> **III. The** appellate Court, either because the reason given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court ...

And then Lord Thankerton said something of special relevance to this appeal:

> ... It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...

Accordingly, it is with the above principles in mind that I turn to analyse the judgment of the learned President.

In evaluating the evidence and discussing the probabilities of the case, the learned President relied on certain factors which I propose to deal with by quoting the relevant extracts from his judgment and then making any comments thereon. At p. 92A he said this:

> This Failure, (referring to the failure to plead the payment of tea money) *Prima Facie* Negatives The Alleged Payment Of Any Tea Money, Premium Or Consideration Of RM65,000.

But, there was no question of the matter of tea money being raised as an afterthought at the hearing because, at the very first opportunity, long before action brought, the appellant's Solicitors, by their letter dated 2 March 1976, reproduced above, did raise it clearly and adequately. So that when the respondents went to trial they came prepared to meet this allegation by calling PW3 who denied that "the tenants could stay on indefinitely" or that tea money was paid.

In this context, there is another point worth mentioning. In the penultimate paragraph of his judgment the learned President said this:

> On the balance of probabilities this Court is of the view, that though there is a lurking suspicion, an inner voice that says, that tea money could have been paid, yet the preponderant probability is that no tea money was paid, ...

Clearly, this finding was made without much confidence.

And, at p. 93D3 to E1 the learned President said this:

> Why Was Not The Fact That The Rent Was RM600 A Month And the Alleged Fact That The Receipt Was For RM330 Not Pleaded In The Defence!

The answer to this is the same as the answer to the point about the payment of tea money, namely, that the allegation of payment of undercounter rental, though not pleaded in the defence, was raised at the first opportunity in the appellant's Solicitors' letter dated 2 March 1976 long before action brought.

In any event, the learned President had found that:

> It is pertinent that the rentals **were** gradually increased from 1958 to 1974, from RM330 to RM800 per month (p. 95A AR1).

And, at p. 92F he said this:

> Surely if RM65,000 tea money was paid to let the premises so long as the tenants wish to occupy them, why should defendants' solicitors state that one of the terms of the Tenancy was that they would not be evicted only as long as the previous owners were able to let the premises.

I fail to see any material contradiction. The solicitors had in fact said in their letter dated 2 March 1976 "that it was a term of the tenancy that the tenants would not be evicted so long as the previous owners were able to let **and** for so long as the tenants wished to occupy them.". The learned President had quoted only the first half of this clause and as a result I do not consider this version in any way inconsistent with that of the First Appellant who said that "the lease was for as long as we could take".

This is made even clearer by M/s. Skrine & Company's subsequent letter dated 4 June 1976, reproduced above, wherein they said, "the facts would appear to be very clearly similar to the Chop Yong Tong Hong appeal which was decided in the Privy Council in favour of the tenant."

And, at p. 93F to 94A he said this:

> The question is was RM65,000 in 1958, which could in 1981 be worth about RM100,000 be paid to Lim Boon Pow, without some form of security, such as a written Tenancy Agreement. DW4 said in evidence that temporary receipts were issued. No receipt or receipts or copies of the receipts or photostat of the receipts were produced in Court.

If, as found by the learned President, that rentals were gradually increased from 1958 to 1974 from RM330 to RM800 per mensem then, clearly, the full rent paid was not receipted. If so, there is nothing improbable in the tea money payment being likewise unreceipted.

It is true that the first appellant (DW4) did say, that at first, temporary receipts were issued for the tea money (a fact which, incidentally, he could easily have denied) but that these were recalled on the request of Lim Boon Pow. His explanation (which was never considered by the learned President) was this:

> Q. Why did you not make a copy of the receipts?
>
> A: I did not think of it ... because at the time of discussion we had agreed that these temporary receipts were to be returned when once the house rent receipt was issued ... At the original discussion Lim Hock Chuan was there. Lim Hock Chuan knew about this. It was all by trust. There was no risk.
>
> (p. 69A & B, AR1).

In these circumstances, I do not propose to place undue stress on the fact that there was no evidence that in 1959 photostatic machines were in use in this country.

And, at p. 94B and C the learned President said this:

> According to DW4 the first defendant, this money of RM65,00 was paid by Lim Peng Kuan now deceased to Lim Boon Pow, the deceased. So we are faced again with a dilemma of one deceased Lim Peng Kuan paying RM65,000 to Lim Boon Pow who is now deceased ...

Although it was the appellant's case that payment of the tea money was by Lim Peng Kuan (the father of third appellant) to Lim Boon Pow and both had since died long before the hearing so that there was no eyewitness testimony of the payment, the evidence of the surrounding circumstances including the conduct of the tenants and of PW3 showed, on the balance of probability, that tea money was paid.

The following is a list of these circumstances, none of which the learned President took into account, except for point 6 and that, too, insufficiently:

(1) There is the evidence of the first appellant that it was orally agreed at the meeting in Lim Boon Pow's house that tea money would be paid. This was never disproved by the respondents because PW3 claimed he was not present at this meeting.

(2) The tenants went into occupation of the premises when they were brand new and empty on 1 January 1959 and remained in peaceful possession for a period of exceeding 17 years although there never was any written tenancy agreement.

Furthermore, the rent receipts suggested a rental of RM330 per month which never varied during all those years.

(3) PW3, who admitted the practice of paying tea money took the position that if his dead partner received tea money, he did not get his share.

(4) The premises were intended and were in fact used as a coffeeshop business on the ground floor and a hotel business on the first floor. (See the certified copy of the Business Registration particulars at pp. 81 and 86 of Appeal Record 2 and note, especially, the date of commencement of the two businesses). Clearly, both businesses were of a long term nature. No one, unless he is an imbecile, would even contemplate commencing such a business on the basis that he was liable to be turned out on one month's notice without payment of compensation. The tenancy must have been much more than just a monthly one. If so, I find nothing improbable in tea money having been paid as consideration for such a tenancy.

(5) The unchallenged and uncontradicted fact that the tenants had incurred an expenditure of RM34,000 on the premises in effecting additions and alterations. Would they have done so if they were liable to be turned out on a month's notice? Clearly, no for as Ong CJ said in *Yong Tong Hong v Siew Soon Wah & Ors*. [1971] 2 MLJ 105 et seq:

> In the instant case it may truly be said that there was, in the minds of the contracting parties, no uncertainty as to the period of tenure. No tenant would willingly pay a large sum of money for a simple monthly tenancy which is terminable at the will of the landlord at any time, or even after the month next following. Hence the parties here had expressly agreed upon a "permanent" letting. On the faith thereof, the RM8,000 was paid and the structural alterations made, doubtless at the appellant's expense, as consideration for his remaining in undisturbed occupation for as long as he pleases, provided rent is paid at the rate stated.

Accordingly, the same probability I have mentioned with regard to point 4 would apply.

(6) The great disparity between the rental charged (namely RM605 per month initially and gradually increasing to RM800 per month in 1974) and the fair rent of similar premises in the neighbourhood which, according to the evidence of the Chartered Surveyor, Encik Sulaiman bin Mustapha, was in 1976, either RM1,200 to RM1,500 per month or alternatively, using a decapitalization method, could be as much as 1,850 per month. There is no doubt this witness who was a professional man was telling the truth as he saw it. The learned President did not disbelieve him but, on the contrary, described his testimony as "persuasive" (p. 94E, AR1) but then, with respect, he dodged the issue, when he omitted to consider the significance of this evidence in relation to the rival versions of the parties as to the terms of the tenancy.

Instead, he said this:

> It is pertinent that the rentals were gradually increased from 1958 to 1974 from RM330 to RM800. However, if tea money of RM65,000 was in fact paid, the defendants would have resisted an increase in rent, which they did not do. On the other hand, the fact that the rentals were increased with the passing years is consistent with the non-payment of tea money. (p. 95A & B, AR1)

I must observe that even if rental had been increased to RM800 per month, it was still much lower than the fair rent, having regard to the unrebutted evidence of the Chartered Surveyor (DW3). Again, this was overlooked by the learned President.

Moreover, DW4 had testified that at the meeting in Lim Boon Pow's house in 1959 when discussions were first held to negotiate the terms of tenancy it had been agreed that tea money was to be paid and "any increase of rental was to be discussed" (p. 67A5 to B1 AR1). This evidence was challenged but was never contradicted by the respondents because, as I have said, PW3 claimed he was not present at these discussions.

(7) Why, if PW3's story was true, that the tenancy was on month to month basis and he had not received any tea money, did he not sell the premises with vacant possession knowing very well that had he done so he could have obtained a far better price?

(8) Under cross-examination, PW3 had admitted that there had been negotiations for sale of the premises between him and the appellants. He said that when he approached the appellants to sell they offered to buy for RM250,000 but he considered this price too low; as a result, over a period of a year, the appellants gradually increased the price to RM320,000 but PW3's final offer was RM330,000. He however denied the allegation by DW4 that the appellants had offered a lower price because they wanted him to take into consideration the tea money paid.

It is clear from the admissions of PW3 that although he was willing to sell the premises to the appellants for as little as RM330,000 an offer which was declined, he had no difficulty in selling some two or three weeks later, to the respondents for as much as RM380,000. Was PW3 offering to sell the premises to the appellants at a price of RM50,000 less than he got from the respondents, out of pure generosity or because he had received tea money? Common sense will supply the answer to this question.

A final point on this part of the case is worth mentioning. Perhaps, Counsel for the respondents in the Court below recognized the strength of the circumstantial evidence showing that tea money was indeed paid for he urged the learned President, in his written submission, that "the Court should not take into consideration the illegal payment of tea money" (p. 15 AR1 last paragraph). There was, of course, nothing illegal about this payment since the premises were not controlled but the point is that Counsel appears to have accepted that there was such payment.

The next question of importance is whether the contractual rights of tenancy which the appellants had with regard to the premises operated to bind the respondents who were third parties.

I have already said that when the respondents purchased the premises they agreed expressly to take it subject to the appellants' tenancy.

The respondents may not have known of the exact nature or terms of appellants' tenancy but that makes no difference. I have already said, when discussing the matters not in dispute, that there were sufficient facts to put them on enquiry as to this but they studiously refrained

from taking advantage of sources of information which were readily available to them, preferring instead to leave the matter to their solicitors who merely made a search at the Land Office Registry and checked the counterfoil receipts.

In such circumstances, I find the following passage in the judgment of Syed Agil J (as he then was) in *Ong Heng Hwa Realty Sdn. Bhd. v. Teoh Chai Siok* [1977] 1 MLJ 124 at 125 precisely in point:

> The plaintiff company although a separate entity as such is more a family enterprise and it is improbable to accept that the shareholders have no such notice. It is the duty of the purchaser who has notice that the vendor is not in possession of the property to make inquiries from the tenant in possession and find out from him what his rights are. If he does not choose to do that then whatever title he acquired as purchaser will be subject to the title or right of the tenant in possession. (Per Vaughan Williams LJ in *Hunt v. Luck* [1902] 1 Ch. 428, 433.).

Returning to the judgment of the learned President, at p. 95 C to E he said this:

> This Court had the opportunity of seeing and hearing the key witnesses in this case. PW3 gave his evidence and so did DW4 and DW5. PW3 did not give the impression he was a confidence trickster! There was nothing in the demeanour or the evidence of PW3 to suggest any fraud or suspicion in his dealings with DW4 and DW5. This cannot however be said of the evidence of DW4 and DW5, as there are improbabilities in the case they have made out.

No one alleged that PW3 was a confidence trickster so this finding by the learned President is quite irrelevant to the issues raised. All that was being said was that he was not telling the truth (a) when he denied having been present at the negotiations held in 1958 in Lim Boon Pow's house which ended in a concluded agreement to let the premises to the appellants; (b) when he claimed that the rent paid pursuant to the said agreement was never varied for 17 years and was at the rate of RM330 per mensem; (c) when he denied the receipts he issued for rental at the rate of RM330 per month were false and (d) when he denied that pursuant to the oral agreement a sum of RM65,000 cash was paid by way of tea money, in four instalments for which temporary receipts were first issued but later recalled.

In other words, the appellants were not saying that PW3 was a confidence trickster but a person who indulged in sharp practice for his personal benefit, who, as a result, was not very forthcoming. He was also a person with the strongest possible motives to lie, if necessary, at the expense of the appellants. His evidence, therefore, could not be accepted at its full face value but had to be checked against the surrounding circumstances and the commercial probabilities of the case. Yet, at no time, did the learned President give the slightest heed to these considerations.

Looking back, I have four general observations to make. The first three concern the judgment of the learned President and the fourth the rival versions of the facts in this appeal. I would state them thus:

(1) Although the hearing of the evidence ended on 5 June 1980 and notice of appeal was filed on 16 December 1980, it was not until 15 September 1981 that he delivered his grounds of judgment. It is not surprising therefore that his grounds left much to be desired.

(2) I accept that it is not essential, indeed it would be perhaps undesirable, for a Judge to deal with every aspect of a case in a long trial. However, where allegations of perjury on one side or the other are in the air, the appellate Court is entitled to address its

mind to the question whether in the light of the undisputed facts and the probabilities of the case "... the trial Judge ... has not taken proper advantage of having seen and heard the witnesses ..." (per Lord Thankerton in *Watt v. Thomas ante*).

(3) Whilst the learned President was at pains to scrape the barrel for every point which he thought told in favour of the respondents, he conspicuously failed to take into account or give proper weight to or draw proper inferences from every fact telling in favour of the appellants. Such a Nelsonian approach was bound to lead to a decision which was against the weight of the evidence.

(4) At the end of the day, the respondents' version is like a jigsaw puzzle whose available pieces, when fitted together, still leave the picture incomplete. There are pieces which have to be found before the whole is clear. These missing pieces are proved by the version of the appellants.

On balance, I therefore find on the facts as follows:

(1) The tenancy was not a periodic tenancy determinable on one month's notice because it was for a period of "as long as the tenants were able to take".

(2) Tea money which was a condition precedent for the grant of the tenancy was in fact paid and this amounted to RM65,000.

(3) The rental paid was initially RM605 per month gradually increasing to RM800 per month in 1975.

(4) The rent receipts and their counterfoils for RM330 per month were consequently false and untrue.

(5) It was on the faith of the representation of the then landlords that the duration of the tenancy would be "for as long as we are able to take" that the tenants paid the RM65,000 by way of tea money and incurred the expenditure of RM34,000 in effecting additions and alterations for the purpose of their hotel business.

(6) In consequence, the evidence of PW3 (a) that the tenancy was a mere monthly tenancy; (b) that no tea money was received; (c) that the rental charged was consistently RM330 per mensem, is contrary to the undisputed facts and the commercial probabilities of the case. It is therefore unacceptable.

(7) The respondents when they purchased the premises took it subject to the tenancy and, although there were compelling reasons for their being put on enquiry that the rent receipts were not all they seemed to be yet they studiously refrained from taking advantage of sources of information which were readily available to them. Consequently, whatever title they acquired as purchasers was subject to the rights of the appellants who were in possession.

I agree with Dato' Mooney, that the circumstances of this case bear a strong resemblance to those in *Yong Tong Hong v. Siew Soon Wah & Ors.* (*supra*).

Lest I be accused of an oversight, I must now consider an objection in law which was the main plank in Mr. Thillaimuthu's submissions.

It was argued that the duty of the Court was to decide the case according to the issues disclosed in the pleadings (See *Esso Petroleum Co. Ltd. v. South Corporation* [1955] 3 All ER 864, and that as it was nowhere alleged in the defence that the appellants were relying on the oral agreement concerned or on the plea of equitable estoppel it was not open to the Court to consider these defences.

I propose, first of all, to consider what transpired in the Court below. There, objection was taken to the admissibility of evidence as to the oral agreement but it was over-ruled, the learned President remarking in his judgment at p. 81B, C:

> This Court nonetheless admitted and carefully considered all the evidence led by the defendants with reference to the terms of the tenancy, and their payment of tea money, though not pleaded (a) to do justice, (b) to lay bare before an appellate Court all the evidence the defendants chose to lead (c) and also so as not to destroy the sequence of the narrative of the defendants' evidence which led to the alleged payment of tea money of RM65,000.

Against this ruling no cross appeal was lodged by the respondents.

In my opinion, the learned President was correct in over-ruling the objection not for the reasons he gave but because the respondents were never taken by surprise when the appellants led the evidence objected to. The letter by Messrs. Skrine & Company dated 2 March 1976, reproduced above, and written long before action brought, sets out adequately and clearly the case for the appellants. This explains why the respondents came to Court prepared to disprove the appellants' contentions in that letter by calling PW3.

Then, again, had the respondents applied for particulars of the defence and had an order been made accordingly, the appellants would merely have repeated what they had already said in Messrs. Skrine & Company's letter of 2 March 1976. Perhaps, understandably, the respondents made no such application.

In this connection, I need refer to only two cases.

In *re Robinson's Settlement* [1912] 1 Ch 717, 727, Buckley LJ said:

> But then it is said Stevens has not pleaded this point. Paragraph 3 of his defence is not very plain, so I will assume that he has not done so. The first answer is to be found in Lindley and A.L. Smith LJJ.'s judgment in *Scott v. Brown, Doering, McNab & Co.* [1892] 2 QB 724, of which the Master of the Rolls has already read part. Beyond that it seems to me that O. XIX, r. 15, on which the plaintiff relies on excluding Stevens from setting this up, has not that effect. O. XIX, r. 15, provided that the defendant must by his pleading do various things. It is not confined, as Mr. Cave contended, to a case where a statute is the thing to be pleaded; it applies to all cases of grounds of defence or reply which if not raised would be likely to take the opposite party by surprise or raise issues of fact not arising out of the pleadings. Where the defendant ought to plead things of that sort the rule does not say that if he does not the Court shall adjudicate upon the matter as if a ground valid in law did not exist which does exist. If in the course of the proceedings it was proved that the deed sued upon was a forgery and the defendant does not plead it or did not know it was a forgery, the Court would not give judgment upon the deed on the footing that it was a valid deed. The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject-matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the Court will deal with him as is just. Therefore it was open to Stevens, and on that ground I think he succeeds.

In *Pirie v. Richardson* [1927] 1 KB 457, Lord Hanworth MR referred to and approved of the above passage in Buckley LJ's judgment.

In any event, I hold that, in these circumstances, the defence of the appellants though perhaps not a model precedent was sufficient for their purposes. The crucial parts of it being para. 3 and 4 which read:

> 3. The defendants have been joint tenants of the said premises since 1 January 1959. The defendants deny that they are monthly tenants at a rental of RM300 per month or any other sum.
>
> 4. The notice to quit is bad in law and is not effective to terminate the tenancy.

My next observation as regards this part of the case is this: it was clear from the evidence and the argument in the Court below that the appellants' primary defence was that there was a binding oral contractual arrangement between them and the respondent's predecessors in title to let the premises for rent as a coffeeshop and a hotel for as long as the appellants were able to take in consideration of the payment not only of rental but of tea money as well and that this arrangement was also binding on the respondents as successors in title since they took the premises for value and with notice.

It was equally clear that the appellants' alternative defence - a second string to their bow as it were - was that independently of any binding contractual arrangement, the facts of the case gave rise not to an equitable estoppel but an equity in their favour to protect their occupation.

It was on the above basis that the case was argued and decided in the Court below as it indeed was before me.

Having found that there was a binding contractual arrangement as aforesaid, that, in my opinion, would be sufficient to dispose of the case in favour of the appellants and there would be no need to consider whether, on the pleadings, it was open to the appellants to raise the alternative defence grounded on an equity protecting the appellants' occupation. However, *ex abundanti cautela* I shall do so.

The first point to note, in this context, is that there appears to be a difference between the two mechanisms of an equity or equitable estoppel for as Viscount Dilhorne put it in *Siew Soon Wah v. Yong Tong Hong* (*supra*) at p. 135 column 2C:

> In these circumstances there arose in the (defendant's) favour an equity or equitable estoppel protecting his occupation ...

This particular passage in Viscount Dilhorne's judgment has been criticised by Meagher and others on *"Equity: Doctrines & Remedies"* 2nd Edn. They say at para. 1721, p. 414:

> This holding, as appears from the above, was unnecessary for the conclusion, and productive of confusion. For it has always been assumed that performance of contractual obligations cannot amount to self-detrimental conduct induced by the other party and thus raising an estoppel against him. The truth of the matter is that estoppel would have been relevant in this case only if their Lordships had held the arrangement void at law for uncertainty so that there was no agreement of which specific performance might be decreed. Granted there was such an agreement, to add estoppel as a ground for decision is to supply a third wheel to the chariot.

The last sentence in the above quotation makes it clear that the three wheels to the chariot were "agreement", "equity" and "estoppel".

Having found, as I do, that the appellants's alternative defence was based not on equitable estoppel but on an equity, I ask myself if it was essential for them to have specifically pleaded this in their defence. I would say, no. As Odgers on "*Principles of Pleadings and Practice in Civil Actions in the High Court of Justice*" 22nd Edn. at p. 94 puts it -

> Conclusions of law or of mixed law and fact are no longer to be pleaded. It is for the Court to declare the law arising upon the facts proved before it.

And this is what Lord Denning MR said in *Tanner v. Tanner* [1975] 1 WLR 1346:

> Points about estoppel were raised too. Those are all ways of stating the legal effect of the facts.

I now come to my conclusions. The contractual arrangement relied on by the appellants was not so vague and uncertain as to be void for uncertainty. It was clearly enforceable in law and conferred upon the appellants rights of tenancy. Whatever the nature of this tenancy, it was certainly far more than just a monthly tenancy. Accordingly, the notice to quit was bad in law and ineffective to determine the tenancy.

On this ground alone, I decided on negative protection by setting aside the orders for vacant possession and mesne profits.

But for the avoidance of doubt, I consider it desirable for me to go further and make a finding as to the nature and duration of the appellant's tenancy.

One thing I cannot do is to grant to the appellants relief by way of specific performance of an agreement for a lease for as long as the law allows. It will be recalled that in *Siew Soon Wah's* case this was construed as a lease for 30 years by virtue of s. 221(3)(b) of the National Land Code since the tenancy comprised only part of the premises and specific performance was decreed for the execution of a lease for the unexpired term.

In this case, the tenancy commenced on 1 January 1959, that is to say, before the coming into force of the National Land Code in Penang so that the law applicable was the Common Law of England. Moreover, the suit was instituted in the Sessions Court where there is no jurisdiction to grant relief by way of specific performance.

I have already said that the respondents' title to the land was a Grant First Grade, Replacement Title.

By virtue of s. 40(1) of the National Land Code (Penang and Malacca Titles) Act, 1963, it is only when the Commissioner of Land Titles is satisfied that the pre-existing estate in such holding was equivalent to an estate in fee simple that he will issue a Grant First Grade.

Nearly 100 years ago, Bowen LJ giving judgment in *The Moorcock* [1889] 14 PD 64 explained that terms would be implied by law where they arose from the presumed intention of the parties and were necessary to give efficacy to the parties' transaction. Fifty years later, in *Shirlaw v. Southern Foundaries Ltd*. [1939] 2 KB 206, Mac Kinnon LJ affirmed this principle when he said the law would imply "something so obvious it goes without saying".

In *Chandler v. Kerley* [1978] 1 WLR 693, 698, Lord Scarman concludes by implying a licensee to remain for 12 months on the ground it is reasonable in the circumstances. And, in *Tanner v. Tanner* (*supra*) at 1350 Denning MR openly admits there is no express contractual licence at all so he "implies" or "imputes" one instead.

Accordingly, on the facts found, I would imply in favour of the appellants, a tenancy to remain in possession of the premises for as long as they use the ground floor as a coffeeshop and the first floor as a hotel.

On a further ground also the appeal was bound to succeed. For, quite apart from the contractual rights of tenancy which the appellants enjoy, the facts gave rise to an equity which protected their occupation of the premises so that when the respondents brought an action to evict the appellants they acted in violation of the original representation made to the appellants as to the duration of their tenancy and, in reliance of which, a detriment had been incurred. In these circumstances a Court may also decide on negative protection and simply dismiss the action for possession.

It will suffice if I cite three cases to illustrate this proposition.

In *Inwards v. Baker* [1965] 2 QB 29, the owner of land told his son that he could build on it and then live there; in particular, he had said, "Why not put the bungalow on my land and make the bungalow a little bigger." The son who had a expectation "of being allowed to stay there" but not that the land was his, did just that, spending money on building and remaining in occupation for the remainder of his father's life. The representation by the father coupled with the detriment incurred in reliance on this assurance, was held to give the son rights to the land. The method of protection which the Court gave was merely to refuse an action for possession against the son and declare that he could remain on the land for as long as he desired to use it as a home.

In *Williams v. Staite* [1979] Ch 29, again there was no unequivocal assurance that the cottage belonged to the young couple, but the parents whom they came to live near merely made a promise that: "You can live here as long as you wish.". Once more, therefore, if the couple had been led to expect occupation rights falling somewhat short of an outright conveyance of a fee simple, it seems only right that the Court should select a remedy which gives effect to what was intended. Accordingly, the Court simply dismissed the action.

In *Ives (ER) Investment Limited v. High* [1967] 2 QB 379, the plaintiffs were refused an injunction to restrain the defendant from exercising a right of way across the former's land.

In the result, I allowed the appeal and set aside the orders for possession and mesne profits, with costs to the appellants both here and in the Court below. I also made orders for refund of the deposit paid by the appellants into Court by way of security for costs of the appeal but, the appellants were to pay to the respondents, arrears of rental at the rate of RM800 per month from and including February 1976 until 30 April 1985.

Also found at [1985] 1 CLJ 586